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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/732,827	12/10/2003	Ann Marie Przepasniak	KCX-660 (19116)	6772
22827 7590 08/08/2008 DORITY & MANNING, P.A. POST OFFICE BOX 1449 GREENVILLE, SC 29602-1449				
EXAMINER CHAPMAN, GINGER T				
ART UNIT		PAPER NUMBER		
3761				
MAIL DATE		DELIVERY MODE		
08/08/2008		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Advisory Action  
Before the Filing of an Appeal Brief**

<b>Application No.</b> 10/732,827	<b>Applicant(s)</b> PRZEPASNAK ET AL.
<b>Examiner</b> Ginger T. Chapman	<b>Art Unit</b> 3761

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 23 July 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.  
 Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
 (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
 (b) ☐ They raise the issue of new matter (see NOTE below);  
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
 5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
 6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
 7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
 The status of the claim(s) is (or will be) as follows:  
 Claim(s) allowed: \_\_\_\_\_.  
 Claim(s) objected to: \_\_\_\_\_.  
 Claim(s) rejected: \_\_\_\_\_.  
 Claim(s) withdrawn from consideration: 4 and 7.

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
 12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_.  
 13. ☐ Other: \_\_\_\_\_.

/Tatyana Zalukaeva/  
 Supervisory Patent Examiner, Art Unit 3761

Continuation of 11, does NOT place the application in condition for allowance because: As an initial matter, the Office action mail date 08/10/2007 objected to the Specification for the use of the trademark term MOCON and advised that the trademark should be capitalized wherever it appears AND be accompanied by the generic terminology. This is a two-pronged requirement, not a choice between one or the other requirement to EITHER capitalize OR use generic terminology. Rather, BOTH capitalization AND generic terminology must accompany the use of a trademark term within the claims/specification. Applicant has capitalized the term where it appears in claims 1, 5, 6 and 12; however, Applicant has not accompanied the term by the generic terminology, i.e. water vapor transmission rate (WVTR) or moisture vapor transmission rate (MVTR) and appropriate units, i.e. g/area/time. Therefore, the objection to claims 1, 5, 6 and 12 stands for failure to capitalize the trademark wherever it appears AND be accompanied by the generic terminology.

With respect to Applicants' request for reconsideration and arguments submitted after final: Applicant argues that:

(I) Blaney discloses outer cover 16 is at least 20% more breathable than inner laminate 50, but Blaney does not describe the breathability of liquid impervious layer 21 and therefore Blaney does not teach a backsheet at least about 20% of a WVTR of the cover sheet. Applicant also submits that:

(II) in order to establish a prima facie case of obviousness, all of the claimed limitations must be taught or suggested by the prior art.

These argument is not persuasive for the following reasons:

(I) the examiner is not replacing the cover sheet of Zhao with the cover sheet of Blaney, the examiner is relying on Blaney for the teaching of selecting a material having a WVTR that is at least about 20% of a WVTR of another material, i.e. that it would be within the general skill of a worker having ordinary skill in the art to select a known material having the desired WVTR for the intended use, because Blaney teaches the selection of known materials on the basis of their WVTR's for the intended use.

(II) Prior art is not limited just to the references being applied, but includes the understanding of one of ordinary skill in the art. The prior art references need not teach or suggest all the claim limitations, however Office personnel must explain why the differences between the prior art and the claimed invention would have been obvious to one of ordinary skill in the art. The "mere existence of differences between the prior art and an invention does not establish the invention's nonobviousness." *Dan v. Johnston*, 425 US 219 (1976).

Here, the prior art contains all that is claimed except for being found in several references instead of in one reference. Therefore, absent evidence to the contrary, the instant claims recite a combination of familiar elements according to known methods with each performing the same function as it had been known to perform with predictable results.

Therefore the examiner respectfully traverses Applicants' arguments and maintains the art rejections of the rejected claims.